IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Stephen J Borello, the Hon. Kirsten Frank Kelly, the Hon. Deborah A. Servitto

DOREEN ROTT,

Plaintiff/Appellant

v

ARTHUR ROTT,

Defendant/Appellee

Supreme Court No.:

Court of Appeals No.: 347609

Lower Court No.: 15-148771-NO

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PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Date: March 2, 2020

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Plaintiff/Appellant says: Yes

Defendant/Appellee will say: No.

II. WAS THE COURT OF APPEALS' RELIANCE UPON THE LAW OF THE CASE DOCTRINE CLEARLY ERRONEOUS, GIVEN THAT IT HAS NEVER IMPLICITLY OR EXPLICITLY ADDRESSED MS. ROTT'S CLAIMS REGARDING THE APPLICABILITY OF THE RUA?

Plaintiff/Appellant says: Yes

Defendant/Appellee will say: No.

III. IS THE RECREATIONAL LAND USE ACT IRRELEVANT TO THIS CASE, BECAUSE MS. ROTT WAS NOT ON THE SUBJECT PROPERTY 'FOR THE PURPOSE' OF ZIP LINING?

Plaintiff/Appellant says: Yes.

Defendant/Appellee will say: No.

IV. IS ZIP LINING WITHIN THE PURVIEW OF THE RUA, GIVEN THAT IT IS NOT WITHIN THE SAME 'KIND, CLASS, CHARACTER, OR NATURE' AS THE ACTIVITIES ENUMERATED WITHIN THE ACT?

Plaintiff/Appellant says: No.

Defendant/Appellee will say: Yes.

STATEMENT OF FACTS

Facts of the Accident.

On the evening of May 24, 2015, Plaintiff/Appellant Doreen Rott presented to the home of her brother, Defendant/Appellee Arthur Rott, and sister-in-law, Julie, to attend a party. (See *Complaint*, attached as Exhibit 1; *Plaintiff's Deposition*, attached as Exhibit 2, pg. 57). Defendant/Appellee and his wife invited Ms. Rott and 40-50 other guests to the event, which Defendant/Appellee classified as a dinner party. (See *Defendant's Deposition*, attached as Exhibit 3, pg. 9, 18). Upon her arrival, Ms. Rott made her way to Defendant/Appellee's back deck, where she greeted family members and began socializing with the other guests. (See Exh. 2, pg. 59). As she did so, she observed partygoers preparing to eat dinner. (See Exh. 2, pg. 59). Ms. Rott joined them in the meal, and afterward, she was approached by Defendant/Appellee and his wife and goaded to take a ride on the couple's backyard zip line. (See Exh. 2, pg. 59-60). As Defendant/Appellee testified during the course of his deposition, Ms. Rott was afraid of the zip line and unwilling to ride it without "prodding" and "encouragement." (See Exh. 3, pg. 46-47). The zip line, which Defendant/Appellee had installed with the help of a neighbor approximately one year prior, had served as a point of contention between Ms. Rott and Defendant/Appellee from its inception, with Defendant/Appellee routinely harassing her about her refusal to ride it. (See Exh. 2, pg. 41-44, 60, 64; Exh 3, pg. 11). At her deposition, Ms. Rott recalled that Defendant/Appellee said, "You're the only one who hasn't gone down it. Why don't you go down it? Come go down it. Let's go down it. I'll hook you up and make sure you are okay." (See Exh. 2, pg. 61). Defendant/Appellee confirmed as much, wherein he testified:

> Q. Now, Doreen testified in her deposition that she was very reluctant to go does the zip line, and that you "pestered" her to do it. What's your recollection of that?

A. I think that a lot of people needed encouragement to go down the zip line.

Q. Why is that?

A. A lot of people say they wanted to do it, but they were afraid, the fear of the unknown, or just because it's an exhilarating experience.

Q. Was Doreen afraid?

A. I think she was concerned. And I prodded her, to answer your question.

(See Exh. 3, pg. 46-47).

Finally succumbing to the pressure of a full year of harassment by Defendant/Appellee Ms. Rott agreed to ride the zip line. (See Exh. 2, pg. 63). Defendant/Appellee strapped Ms. Rott into a leather harness seat hanging from the zip line, and as he did so, he said:

A. … He said, "I'll strap you in. This is your moment – the moment I've been waiting for. I'm going to get rid of you now." But of course, he was joking.

Q. What else did he say before you went?

A. He said, "You'll be fine. Don't be scared." He goes, "Some people like to be pushed off because it's more fun that way."

Q. Did he say anything else?

A. No.

******

Q. What else – if anything – did Art say to you before you went on the zip line?

A. "Have fun. Enjoy the ride."

Q. Did he give you any instructions on what to do when you were going down?

A. No.

(See Exh. 2, pg. 70-71, 72). As she readied herself for the ride, Ms. Rott asked Defendant/Appellee where to put her hands. (See Exh. 2, pg. 73). He instructed her to "hold on tight" to the handlebars and sent her down the zip line, toward a tree located at the bottom of a hill, roughly 185 feet away. (See Exh. 2, pg. 73; Exh. 3, pg. 29). Despite his testimony that during the final three-quarters of the run, the line fell so close to the ground that a rider could touch the ground with her feet, Defendant/Appellee noted that he did not tell Ms. Rott to keep her feet raised, wherein he admitted, "… I do not believe I told her to keep her feet up at the bottom." (See Exh. 3, pg. 35, 45).

As her ride neared its conclusion, Ms. Rott felt her speed picking up, as she dipped lower and lower to the ground. (See Exh 2, pg. 78). Because she had received no instructions regarding how to stop and/or how the ride would end, Ms. Rott had no way of knowing that her ride would be stopped by a bungee mechanism attached to the zip line and the tree. (See Exh. 2, pg. 79-80). Without this critical information, she made the reasonable assumption that because she was nearly at ground level, the ride was over and she needed to stop herself by lowering her feet to the ground. (See Exh. 2, pg. 80). As she did so, her leg struck the ground. (See Exh. 2, pg. 92). The zip line then continued on to its end point, where Defendant's neighbor, Gary Kukulka, was waiting to help Ms. Rott to the ground. (See Exh. 2, pg. 92). Although she felt some pain in her left knee, she believed it to be a pulled muscle and did not mention it to Defendant/Appellee or anyone else at the party. (See Exh. 2, pg. 92). Unfortunately, rather than abate, Ms. Rott's pain increased over the course of the holiday weekend and became unbearable. (See Exh. 2, pg. 97). She presented for treatment for left knee, back and hip pain, and ultimately, it was determined that during the course of her zip line ride, Ms. Rott suffered a tear in both left knee menisci, as well as a disc herniation at L3-L4 and a pelvic injury. (See Exh. 2, pg. 23, 105).

Facts of the Zip Line.

Approximately one year prior to Ms. Rott's incident, Defendant/Appellee and his neighbor, Mr. Kukulka, hatched a plan to run a zip line from Defendant/Appellee's back deck, down a hill, to a tree located approximately 185 feet away. As Mr. Kukulka testified:

> **A. I believe I was the first one to mention it. I said – you know, just hanging out on his back porch. Just saying, "You got a really cool backyard that you could hang a zip line."**
>
> **A. And then from there, you know, the ball started rolling. We started throwing out ideas. We started looking it up online, and that's – so I guess it was my idea, but ultimately, it was his decision.**

(*See Kukulka Deposition*, attached as Exhibit 4). Although neither Defendant/Appellee nor Mr. Kukulka had any engineering, construction, or other experience that would arm them with the knowledge and/or ability to safely install a zip line, they pressed forward. (See Exh. 3, pg. 5-8; Exh. 4, pg. 5-7). This, despite the fact that Defendant/Appellee had never even ridden a zip line. (See Exh. 3, pg. 20). With Google as his guide, Defendant/Appellee selected a zip line kit and set about making modifications to his deck to accommodate it. (See Exh. 3, pg. 23).

Defendant/Appellee and Mr. Kukulka installed it without any assistance or guidance from a qualified individual. (See Exh. 3, pg. 22). As Defendant/Appellee testified, "We installed it ourselves. … Gary and I installed it utilizing the instruction booklet that came with the system." (See Exh. 3, pg. 22; see *Photos of Zip Line*, attached as Exhibit 5). In doing so, Defendant/Appellee admitted that they did not account for the uneven grade of the downhill slope, despite knowing that at one point near the end of the ride – the very point where Ms. Rott sustained injury – the ground rose up high enough that a rider could touch her feet to the ground. (See Exh. 3, pg. 35-36). Defendant/Appellee and Mr. Kukulka tested the zip line using weighted bags and human test

subjects to measure the speed of riders and the ability of the zip line to stop prior to hitting the tree. (See Exh. 3, pg. 31-33). Even after Mr. Kukulka, as well as Defendant/Appellee's brother-in-law, crashed into the tree, Defendant/Appellee pressed on with his plan to install the zip line and utilize it as a party trick for his many social gatherings. (See Exh. 3, pg. 33-35). Throughout the time between when he installed the zip line and Ms. Rott sustained injury, he continued to tinker with it, in an attempt to make it safe. (See Exh. 3, pg. 39-42). Ultimately, though, Defendant/Appellee contacted an attorney to prepare a waiver of liability for riders to sign, prior to utilizing the zip line. (See Exh. 3, pg. 43-44). As Defendant/Appellee testified, "… we felt it was important, as best we could, against certain people to protect ourselves." (See Exh. 3, pg. 44). Although Defendant/Appellee testified that he required all those who intended to ride the zip line to sign the waiver, he admitted that he did not require Ms. Rott to do so prior to her ride. (See Exh. 3, pg. 46).

PROCEDURAL HISTORY

On August 26, 2015, Ms. Rott filed suit, alleging claims of negligence and premises liability against Defendant/Appellee. (See Exh. 1). Rather than admit his liability for her injuries, Defendant/Appellee disavowed any knowledge that her injuries arose directly from his negligent installation and operation of the zip line, as well as his failure to instruct Ms. Rott on the proper way to ride the zip line. To wit, Mr. Rott testified that he made no adjustments to the zip line following Ms. Rott's incident, aside from typical maintenance to remove the slack that naturally develops, and he further testified that he instructed her that the bungee system at the end of the line would stop her ride. (See Exh. 3, pg. 45, 50). However, the testimony proffered by Ms. Rott and the parties' sister, Helen Kanter, belies Defendant/Appellee's claims:

> **A. … [Defendant] told me right after Doreen was hurt that he and Gary higher-ed up the zip line a lot so that it wouldn't happen anymore. And [Defendant] lied in his deposition, and said he didn't change it after she was**

hurt, because his attorney told him not to, he told me that he had.

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A. Doreen was hurt on a Sunday before Memorial Day. Art told me within one to two weeks, he said, Gary and I made sure that we higher-ed it in a hurry because we don't want anyone else to get hurt, and Gary knows how to do this, because he's an engineer.[1]

(See *Deposition of Helen Kanter*, attached as Exhibit 6, pg. 12, 15).

In furtherance of this tactic, Defendant/Appellee filed a dispositive motion, wherein he attempted to persuade the trial court to rely upon an inapplicable statute to dismiss Ms. Rott's claims against him. In addition, he attempted to twist facts of the case, such that the open and obvious doctrine would shield him from liability. Ms. Rott vehemently opposed the motion as founded upon improper and unsupported arguments, and on November 30, 2016, the parties appeared before the trial court for oral argument. Ultimately, the trial court denied portions of the motion, while granting others. In particular, the trial court ruled that the Recreational Land Use Act, MCL 324.73301(1) controlled; however, it could not be used to dismiss Ms. Rott's claims, given that a question of fact remained as to whether Defendant's conduct was grossly negligence. (See *11/30/2016 Order*, attached as Exhibit 7). It went on to rule that because of the application of the RUA, Ms. Rott's premises liability claim could not lie. (See Exh. 7). Based upon these rulings, Ms. Rott filed an Application for Leave to Appeal, asking the Court of Appeals to examine whether the RUA applied, given that she was not on the subject premises "for the purpose" of zip lining, and given that zip lining is not of the same "kind, class, character, or nature" of the activities

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[1] Ms. Kantor's recollection of her conversation with Defendant/Appellee notwithstanding, the record makes it clear that Mr. Kukulka is not, in fact, an engineer, given that he testified at his deposition that he has worked as a generator technician for a diesel engine manufacturer since 2009. (See Exh. 4, pg. 7).

contemplated by the RUA. Defendant/Appellee filed his own Application for Leave to Appeal, wherein he requested that the Court of Appeals reverse the trial court's rulings that Ms. Rott had sufficiently pled a claim for gross negligence and that, given that applicability of the RUA, a question of fact remained as to whether his conduct was grossly negligent.

The Court of Appeals denied Ms. Rott's application but granted that of Defendant/Appellee, and as a result, solely the narrow issues relating to gross negligence made their way through the Court of Appeals on interlocutory appeal. (See *COA Docket No. 336240, 05/04/2017 Order*, attached as Exhibit 8; *COA Docket No. 336242, 05/04/2017 Order*, attached as Exhibit 9). In denying Ms. Rott's application, the Court of Appeals made no determination, either implicitly or explicitly, as to the merits of the issues raised therein, wherein it ordered, in relevant part, "The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review." (See Exh. 9). In granting Defendant/Appellee's application, the Court of Appeals ordered, in relevant part, "The Court orders that the application for leave to appeal is GRANTED. … This appeal is limited to the issues raised in the application and supporting brief." (See Exh. 8).

The parties thus duly briefed the issues relating to gross negligence only and thereafter appeared for oral argument. On December 18, 2018, the Court of Appeals rendered its decision, holding that Defendant/Appellee's conduct did not raise to the level of gross negligence, and as such, he was shielded from liability by the RUA. (See *12/18/2018 Opinion and Order*, attached as Exhibit 10). The Court of Appeals began its analysis by noting, "The trial court found that the RUA applied to the facts of the case." (See Exh. 10, pg. 2). It went on to provide the relevant language of the RUA, the definition of gross negligence, and a three-part test to determine whether conduct can be classified as wonton and willful. (See Exh. 10, pg. 2-3). At no time did the Court

of Appeals engage in any analysis whatsoever as to whether the RUA applied to the facts before it, ostensibly because, pursuant to its own orders, the parties did not raise the issue during the course of the interlocutory appeal. (See Exh. 8; Exh. 9; Exh. 10). Instead, the Court of Appeals immediately set about determining whether questions of fact remained as to whether Defendant/Appellee's conduct could be considered grossly negligent, such that he could be held liable for Ms. Rott's injuries, the RUA notwithstanding. Ultimately, the Court of Appeals held that no question of fact remaining regarding gross negligence, explaining:

> At the very most, an argument could be made that defendant was ordinarily negligent in the installation and operation of the zip line, as well as the lack of warnings to the riders, but ordinary negligence is insufficient to create a material question of fact as to whether the RUA's exception applies.

(See Exh. 10, pg. 4). (Internal citations omitted). It thus reversed the trial court's ruling and remanded the case for entry of an order granting summary disposition in favor of Defendant/Appellee. Thereafter, on February 8, 2019, the trial court entered an order in conformance with the Court of Appeals' ruling and dismissed the case. (See *02/08/2019 Order*, attached as Exhibit 11). It is from this final order that Ms. Rott's appeal as of right flowed.

Given that the case had been dismissed in its entirety, the issues Ms. Rott initially sought to be reviewed on an interlocutory basis in 2017, finally became rip for appellate review pursuant to MCR 7.203(A)(1). Accordingly, she asked the Court of Appeals to evaluate:

> (1) Whether the RUA is relevant to the instant case, given that Ms. Rott was not on the subject property "for the purpose of" zip lining; and
>
> (2) Whether zip lining falls within the purview of the RUA, given that it is not within the same "kind, class, character, or nature" as the activities enumerated within the RUA.

The appeal proceeded in typical fashion, and on January 21, 2020, the Court of Appeals issued its opinion relating thereto, which is slated for publication, and it is from that opinion the instant application for leave to appeal flows. (See *01/21/2020 Opinion and Order*, attached as Exhibit 12).

The Court of Appeals began its analysis by describing the history of the case, and in so doing, it noted, "[T]he trial court originally determined that the Recreational Land Use Act (RUA), MCL 324.73301, applied to this matter, and '[zip lining] in this instance is an outdoor recreational activity as defined in the [RUA] and that Plaintiff's specific purpose for being on the land at the time of the accident, was for the purpose of using the [zip line].'" (See Exh. 12, pg. 2). It went on to agree with Defendant/Appellee's suggestion that "this Court already 'tacitly approved' of the application of the RUA to these facts in its previous opinion … ." (See Exh. 12, pg. 3). In support of this position, the Court of Appeals pointed to the following passage found within the December 2018 opinion: "Plaintiff accepted the inherent risk associated with riding a self-installed zipline on her brother's property. Absent gross negligence or willful and wonton conduct on the part of defendant, plaintiff cannot recover from damages resulting from the zipline." (See Exh. 12, pg. 3, quoting Exh. 10, pg. 4). Thereafter, the Court held, "This Court implicitly decided that the RUA applied in its previous opinion, and plaintiff's arguments on appeal stemming from whether the RUA applies are therefore subject to the law of the case doctrine." (See Exh. 12, pg. 3).

The Court of Appeals then went on to engage, for very first time, in analysis regarding whether the RUA applied to the instant case, given that Ms. Rott was on the land "for the purpose of" attending a party, and whether zip lining was the type of activity contemplated by the writers of the RUA, i.e., the substantive issues Ms. Rott brought before the appellate court as of right. Regarding the first issue, the Court of Appeals held that the phase "for the purpose" modified the phrase "valuable consideration," and as a result, "the statute applies if a person does not pay the

owner of the land a valuable consideration for the purpose of the recreational activity." (See Exh. 12, pg. 4). It concluded that "the trial court did not err in its determination that plaintiff's 'specific purpose for being on the land at the time of the accident, was for the purpose of using the [zip line]." (See Exh. 12, pg. 4). Regarding whether the act of zip lining falls within the purview of the RUA, the Court of Appeals held, "we conclude that zip lining is of the same kind, class, character or nature of the recreational activities enumerated in the statute[,]" because the Supreme Court has held that building sand castles, throwing stones into the water, splashing around, and riding an all-terrain vehicle have all been considered "recreational activity under the act." (See Exh. 12, pg. 5). Accordingly, the Court of Appeals affirmed the trial court's order granting summary disposition.

Ms. Rott has filed the instant application to address the Court of Appeals' clearly erroneous reliance upon the law of the case doctrine, given the issue on appeal, i.e., the application of the RUA to the instant case, had been neither explicitly nor implicitly previously addressed by the Court of Appeals, as well as to request enforcement of the phase "for the purpose of" as it is unambiguously written and, finally, to address whether zip lining falls within the purview of the RUA, given that the ever-increasing popularity of the activity makes it plain that the ruling is one of major significance to the state's jurisprudence. For the reasons laid out more fully herein, Ms. Rott now respectfully requests that this Honorable Court GRANT her application and thus allow her to bring these issues before the Michigan Supreme Court for review.

LAW AND ARGUMENT

Standard of Review.

Regarding the standard of review governing the substantive issues of this case, i.e., dispositive motions and questions of law, Plaintiff/Appellee agrees with and reasserts the standard articulated by the Court of Appeals in its December 18, 2018 Opinion:

> We review a trial court's grant or denial of summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).…
>
> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5)." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

(See Exh. 10, pg. 2).

Regarding the procedural issue of whether this Court should accept Ms. Rott's application, Ms. Rott directs this Court's attention to MCR 7.305(B)(1)-(6). Therein, the Michigan Court Rules provide the grounds by which an application such as this can be granted or denied, wherein it states, in relevant part, that the application must show:

> ******
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> ******
>
> (5) In an appeal of a decision of the Court of Appeals,
>
> a. the decision is clearly erroneous[2] and will cause material injustice, or
>
> b. the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; … .

[2] "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

The statute is compulsory, wherein it demands that an application "must show[;]" thus, where such a showing is made, an application must be granted.

I. THE INSTANT APPLICATION FOR LEAVE TO APPEAL ARISES FROM CLEARLY ERRONEOUS RULINGS BY THE COURT OF APPEALS, THE CORRECTION OF WHICH WILL PROVIDE VALUABLE INSIGHT INTO MULTIPLE LEGAL PRINCIPLES THAT ARE SIGNIFICANT TO THE STATE'S JURISPRUDENCE.

As detailed throughout the Statement of Facts and Procedural History, the instant case has wound its way through the Court of Appeals for years, and unfortunately, despite multiple opportunities to do so, the Court of Appeals has never addressed Ms. Rott's substantive claims relating to the applicability of the RUA in any binding way. To wit, the Court of Appeals denied her application for leave to appeal, wherein she initially raised the issues, and in its opinion relating to her appeal as of right, the Court of Appeals held that her claims were barred by the law of the case doctrine, before proffering extensive dicta as to applicability of the RUA. Ms. Rott submits that the Court of Appeals' ruling was clearly erroneous wherein it relied upon the law of the case doctrine, and its dicta was similarly clearly erroneous, wherein it failed to follow this Court's unambiguous mandate in *Hardway v Wayne County* and it extended the scope of the RUA far beyond the bounds contemplated by the Legislature. *See* 494 Mich 423; 835 NW2d 336 (2013).

Moreover, the issues raised herein involve legal principles of major significance, given the legislative intent behind the RUA and the ever-increasing popularity of amateur zip lines such as the one at issue herein. Within Michigan's borders lie more than 19 million acres of forest, 36,000 rivers and streams and 11,000 inland lakes. (See Pure Michigan, *Outdoor Fun* <www.michigan.org/recreation> (accessed on March 2, 2020)). While many of these natural resources are located on public land, a significant portion can also be found on private property. Cognizant of this fact, and in the interest of encouraging Michigan residents to open up their land

for recreational use by others, the Legislature enacted the Recreational Land Use Act, codified at MCL 324.73301, in 1953. In its current iteration, the RUA provides:

> … a cause of action does not arise for injuries to a person who is on the land of another without paying to the owner, … of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, … against the owner, … unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner … .

MCL 324.73301(1). Since its enactment more than 60 years ago, the RUA has been addressed by the appellate judiciary less than 30 times, and with the exception of whether the statute applies to developed plots, as well as undeveloped tracts of land, the language of the statute itself has rarely been examined. See e.g., *Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004); *Wymer v Holmes*, 429 Mich 66, 68; 412 NW2d 213 (1987); *Winiecki v Wolf*, 147 Mich App 742, 745; 383 NW2d 119 (1985). Ms. Rott submits that the instant case proffers this Court an opportunity to weigh in on two provisions of the statute, and in doing so, provide much-needed clarity for Michigan residents considering whether to open their property for use and enjoyment by others.

First, the instant case allows this Court to analyze whether the "for the purpose" clause speaks to the activity at issue or the payment relating to that activity. This is significant, because it impacts the proofs and defenses relating to claims arising out of the RUA. That is, should this Court choose to address this issue, litigants will know whether to focus on facts relating to whether the injured party *paid to partake* in the subject activity or facts relating to the injured party's *intent to partake* in the subject activity.

Beyond that, the instant case affords this Court to opportunity to determine whether zip lining is the type of activity contemplated by the RUA. As noted herein, the act itself delineates the following activities as subject to its protections: Fishing, hunting, trapping, camping, hiking,

sightseeing, motorcycling, snowmobiling, as well as any other outdoor recreational use or trail use. MCL 324.73301(1). These activities share a common theme, in that they involve an interaction with the land itself, rather than an apparatus constructed on the land. Only twice has this Court addressed whether specific activities fall within the scope of "any other outdoor recreational use or trail use," and in both instances, this Court found that the activities at issue, i.e., ATV riding and beach/water play, including the building of sand castles, tossing of stones, and splashing in the shoreline, were "of the same kind, class, character, or nature as those specifically enumerated [in the RUA]." *Neal*, 470 Mich at 669 (quoting *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001)). In both circumstances, the activities at issue involved an interaction with the land itself, rather than an apparatus constructed on the land, as in keeping with the RUA's specifically enumerated recreational activities. By contrast, the instant case presents a situation wherein Defendant/Appellee has sought to extend the scope of the RUA to include use of a zip line constructed on the premises by the landowner, and although the trial court and Court of Appeals agreed with Defendant/Appellee's contention, for the reasons laid out more fully below, Ms. Rott vehemently submits that this agreement is clearly erroneous. Of course, this Court cannot find itself in the position of evaluating each and every possible activity that can be enjoyed outdoors; however, in this case, this Court's analysis regarding zip lining is critical, because it will proffer guidance on a whole array of activities that result from an interaction with an apparatus constructed by the land owner, rather than merely with the land itself.

Finally, it is in the public's best interest to understand the rights and responsibilities associated with zip lining, given that as of 2015, i.e., the year of the subject incident, more than 13,000 amateur zip lines could be found in backyards and recreational areas across the country, and with the skyrocketing rise in the popularity of zip lining has come an enormous increase in zip

line-related injuries. (See Nationwide Children's Hospital, *Zipline-Related Injuries Are Rapidly Increasing*, <https://www.nationwidechildrens.org/newsroom> (accessed on March 2, 2020)). In a study conducted by researchers with the Center for Injury Research and the Policy of the Research Institute at Nationwide Children's Hospital, 16,850 non-fatal zip lining injuries occurred in the U.S. between 1997 and 2012, and of those, nearly 70 percent occurred between 2008 and 2012. *Id*. Moreover, in 2012 alone, more than 3,600 reported to U.S. emergency departments for treatment of zip line-related injuries. *Id.* According to researchers, so-called homemade zip lines, such as the one at issue herein, are particularly dangerous, and "[d]ue to the inherent risks associated with homemade ziplines, parents, caregivers, and children should not install and use ziplines at home," said [Tracy Mahan, MA, manager of translational research for the Center for Injury Research and Policy at the Research Institute at Nationwide Children's and one of study's authors]. "Improper installation, maintenance, or use of homemade ziplines can result in serious injuries and even death." *Id*. Given the dangers associated with the activity, this Court's analysis as to whether zip lining falls within the scope of the RUA is critical. This is so, because it will allow landowners and recreation seekers alike a clearer understanding of the liability associated with the increasingly popular activity. Ms. Rott submits that the Court Appeals itself recognized the significance of the decision, given that the it is slated for publication, and thus it is all the more critical that the analysis contained therein, which will be binding precedent, be subjected to review by this Court.[3] Accordingly, Ms. Rott submits that the issues relating to the interpretation of the RUA, i.e., the "for the purpose" clause and whether zip lining falls within its purview, are, indeed,

[3] MCR 7.215(B) mandates, in relevant part: "A court opinion must be published if it: (1) establishes a new rule of law; (2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule… (5) involves a legal issue of significant public interest … ."

of such significance to Michigan's jurisprudence that this Court should GRANT her application for leave to appeal.

II. THE COURT OF APPEALS' RELIANCE UPON THE LAW OF THE CASE DOCTRINE WAS CLEARLY ERRONEOUS, GIVEN THAT IT HAS NEVER IMPLICITLY OR EXPLICITLY ADDRESSED MS. ROTT'S CLAIMS REGARDING THE APPLICABILITY OF THE RUA.

As an initial matter, Ms. Rott respectfully submits that review of the Court of Appeals' January 21, 2020 opinion is vital, because its reliance upon the law of the case doctrine is clearly erroneous, and if the holding were permitted to stand, it would cause confusion and conflict in an otherwise well-settled area of jurisprudence. "… [T]he law-of-the-case doctrine … is a discretionary doctrine that expresses the general practice of the courts and is not a limit on the power of the courts." *IBM v Dep't of Treasury*, 316 Mich App 346, 353; 891 NW2d 880 (2016) (citing *Locricchio v Evening News Ass'n,* 438 Mich 84, 109, n 13; 476 NW2d 112 (1991), and *Freeman v DEC Int'l*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995)). "'[It] provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue[.]'" *Brownlow v McCall Enters*, 315 Mich App 103, 110-111; 888 NW2d 295 (2016) (citing *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997)). It addresses the "'need for finality of judgment and the lack of jurisdiction of an appellate court to modify its judgements, except on rehearing.'" *Id*. (quoting *South Macomb Disposal Auth v American Ins C*o, 243 Mich App 647, 654; 625 NW2d 40 (2000)). Critically, "[t]he law of the case doctrine applies ***only to questions actually decided in the prior decision*** and to those questions necessary to the court's prior determination." *City of Kalamazoo v Department of Corrections*, 229 Mich App 132, 135-136; NW2d 475 (1998) (citing *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992)). (Emphasis added). A

decision may be explicit or implicit, but, for the doctrine to apply, the merits of the issue must have been considered. *Grievance Adm'r v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

In *Grievance Adm'r v Lopatin*, this Court provides significant guidance into application of the doctrine in circumstances such as those present in the instant case, i.e., where the doctrine is evoked following an appellate court's denial of an application for leave to appeal. *Id*. at 259-260. The case addressed a myriad of substantive ethical issues, but with regard to the law of the case doctrine, this Court rejected the suggestion that "that our prior order denying the Grievance Administrator's application for leave to appeal constitutes the law of the case." *Id*. at 259. In so doing, this Court explained:

> Law of the case applies, however, only to ***issues actually decided***, either implicitly or explicitly, in the prior appeal. *Webb* [*v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997)]; *Roth v Sawyer-Cleator Lumber Co*, 61 F3d 599, 602 (CA 8, 1995). ***In denying the Grievance Administrator's application for leave to appeal in this case, we expressed no opinion on the merits.*** See *Frishett v State Farm Mut Auto Ins Co*, 378 Mich 733 (1966) (order); cf. *Teague v Lane*, 489 US 288, 296 (1989) (the denial of a writ of certiorari imports no expression of opinion on the merits of the case). Therefore, the law of the case doctrine does not apply. See *Mirchandani v United States*, 836 F2d 1223, 1225 (CA 9, 1988).

Id. at 260. (Emphasis added).

Relying on *Grievance Adm'r v Lopatin* in a May 20, 2015 order issued in *People v Poole* (Docket No. 150623), this Court held, in relevant part, "[T]he law of the case doctrine does not apply because prior orders denying leave to appeal were not rulings on the merits of the issues presented." 497 Mich 1022; 862 NW2d 652 (2015). To wit, Defendant Poole had previously sought review of appellate decisions from this Court on February 10, 1993 (Docket No. 95882) and December 7, 2007 (Docket No. 135398). In each case, this Court denied his application for leave to appeal as follows:

> The application for leave to appeal also is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. *People v Poole*, 442 Mich 930; NW2d 907 (1993); and
>
> On order of the Court, the application for leave to appeal the October 23, 2007 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). *People v Poole*, 480 Mich 1186; 747 NW2d 275 (2008).

Given this Court's unambiguous language, it is plain that in evaluating the applications, this Court did not weigh the merits at issue, either implicitly or explicitly, and thus, these prior orders could not be used to bind this Court in its May 20, 2015 decision.

In light of this clear jurisprudence, it is likewise plain that the Court of Appeals' May 4, 2017 order denying Ms. Rott's application for leave to appeal cannot be used to support an application of the law of the case doctrine relating to the RUA, and nor can the narrowly-tailored opinion issued on December 18, 2018. This is so because nowhere in either decision did the Court of Appeals examine the merits of the finding that the RUA applied to the instant case. Turning first to the May 4, 2017 order relating to Ms. Rott's application for leave to appeal, in denying the application, the Court of Appeals made absolutely no mention of its substance. (See Exh. 9). Instead, it stated, "The Court orders that the application for leave to appeal is DENIED for ***failure to persuade the Court of the need for immediate appellate review***." (See Exh. 9). (Emphasis added). By its plain language, the order allows that at some point in the future, i.e., when Ms. Rott's appeal as of right becomes ripe, the issues raised by Ms. Rott can be subject to appellate review. The order speaks to immediacy only. (See Exh. 9). In addition to this order, the Court of Appeals issued a second order on May 4, 2017, wherein it granted Defendant/Appellee's application for leave to appeal, with the admonishment that "[t]his appeal is limited to the issues raised in the application and supporting brief." (See Exh. 8). Accordingly, the parties, in

compliance with the Court of Appeals' orders, focused the interlocutory appeal on the issues relating to gross negligence only, under the framework put in place by the trial court's ruling that the RUA applied to the instant case. (See Exh. 7; Exh. 10). In similar fashion, and in keeping with its own orders, the Court of Appeals engaged in absolutely no analysis regarding the applicability of the RUA, and instead it limited its focus to gross negligence. (See Exh. 10). To that end, it laid out the language of the RUA, the definition of gross negligence, and the three-part test for determining whether conduct can be considered wonton and willful, before ultimately concluding, " … we are unable to identify conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." (See Exh. 10, pg. 5). This holding led to the dismissal of the remainder of Ms. Rott's claims, and on February 19, 2019, the trial court entered a final order to that effect.

Shortly thereafter, Ms. Rott filed her appeal as of right pursuant to MCR 7.203(A), at which time, she alleged that the trial court erred in ruling that the RUA applied to the instant case, as well as in ruling that a zip line falls within the purview of activities contemplated by the RUA. Ms. Rott maintained an appeal as of right, given her status as an aggrieved party. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 292; 715 NW2d 846 (2006).[4] Because the appeal was the very first time Ms. Rott was permitted by court rule or court order to seek review of the trial court's ruling as to the applicability of the RUA, she was surprised at the Court of Appeals' conclusion in its January 21, 2020 decision that "[t]his Court implicitly decided that the RUA applied in its previous opinion and plaintiff's arguments on appeal stemming from the RUA are therefore subject to the law of the case doctrine." (See Exh. 12, pg. 3). Effectively, the ruling condemns Ms. Rott to remain the aggrieved party, given the Court of Appeals' misapplication of the law of the case

[4] An aggrieved party, for purposes of MCR 7.203(A), is one who demonstrates "an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." 475 Mich at 292.

doctrine to the instant case. This is so, because the record makes it clear that prior to its January 21, 2020 opinion, Court of Appeals has never addressed, nor declined to address, her RUA claims based upon its merits. Thus, the Court of Appeals' reliance upon the law of the case doctrine to dismiss Ms. Rott's claims runs afoul of this Court's unambiguous holdings in *Grievance Adm'r v Lopatin* and *Poole* (Docket No. 150623), as well as the well-established body of jurisprudence relating to the doctrine, and as a result, the action was clearly erroneously. Accordingly, Ms. Rott now asks this Honorable Court to GRANT her application for leave to appeal, so that she may bring this claim for this Court for appellate review.

III. THE RECREATIONAL LAND USE ACT IS IRRELEVANT TO THIS CASE, BECAUSE MS. ROTT WAS NOT ON THE SUBJECT PROPERTY 'FOR THE PURPOSE' OF ZIP LINING.

Throughout the course of litigation, Defendant/Appellee has gone to great lengths to convince first the trial court, and later, the Court of Appeals, that Ms. Rott's claims are barred by the RUA. To date, he has succeeded, but Ms. Rott submits that Defendant/Appellee's success is predicated on the improper interpretation of the statute. In particular, the Court of Appeals relies on an incomplete reading of this Court's admonishment in *Hardway v Wayne County* to suggest that the phase "for the purpose of" modifies the phrase "valuable consideration" rather than the activity at issue. (See Exh. 12, pg. 4, quoting *Hardway*, 494 Mich at 427). If these clearly erroneous findings by the Court of Appeals are permitted to stand, they will amount to a material injustice to Ms. Rott, because they will wholly impede her ability to litigate her cause pursuant to the framework contemplated by the legislature, in its writing of the RUA, and the judiciary, in its analysis thereof.

Throughout the course of the case, Ms. Rott has ardently maintained that the evidence in the record, including testimony proffered by both Ms. Rott and Defendant/Appellee, unequivocally

establishes that she was on the subject premises ***for the purpose*** of attending a family party in celebration of the first summer holiday, i.e., an activity not contemplated by the RUA. Ms. Rott has thus further maintained that as a result, the statute cannot be used to bar to her claims against Defendant/Appellee. In support of her position, Ms. Rott turns to upon the plain language of MCL 324.73301(1), which provides, without exception:

> Except as otherwise provided in this section, a ***cause of action shall not arise for injuries to a person who is on the land of another without paying*** to the owner, tenant, or lessee of the land a valuable consideration ***for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use*** or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

(Emphasis added). The statute contains no terms of art or other language that requires definition by the statute, and it is written in a plain and unambiguous manner, such that, it must be applied without judicial construction. As this Court well knows, when analyzing the text of a statute, the Court is required to give the language its "plain and ordinary meaning." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). "If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Id*. Where, as here, the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). As a result, judicial construction of an unambiguous statute is neither required nor permitted. *In re MCI Telecom Complain*t, 460 Mich 396, 411; 596 NW2d 164 (1999).

This mandate notwithstanding, the Court of Appeals engaged in lengthy statutory construction to determine which phase the statute is modified by the phase "for the purpose of." To wit, after affirming the trial court's ruling based upon its reliance on the law of the case doctrine,

the Court of Appeals went on to write, "A plain reading of the statute does not lend itself to plaintiff's interpretation that the statute requires a person to be on the property for the purpose of the recreational activity for the statue to apply." (See Exh. 12, pg. 4). Rather, according to the Court of Appeals, "the statute applies if a person does not pay the owner of the land a valuable consideration for the purpose of the recreational activity." (See Exh. 12, pg. 4). In support of this reading of the statue, the Court of Appeals' relies upon the following directive from this Court, issued in *Hardway v Wayne County*: "Under the last antecedent rule of statutory construction, 'a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or the last antecedent, unless something in the statute requires a different interpretation.'"[5] (See Exh. 10, pg. 4, quoting *Hardway*, 494 Mich at 427). In so doing, however, the Court of Appeals apparently disregards the qualifying phrase, i.e., "unless something in the statute requires a different interpretation." *Id*. An examination of the context of this Court's admonishment in *Hardway* makes it plain that the modifying clause at issue herein is precisely the type subject to this Court's qualifier. In *Hardway*, this Court admonished, "[I]t bears emphasizing that the last antecedent rule should not be applied blindly." *Hardway*, 494 Mich at 428. To that end, this Court warned, "the last antecedent rule should not be applied if 'something in the statute requires a different interpretation' than the one that would result from applying the rule." *Id*. (quoting *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002)). Ms. Rott submits that given the legislative intent underlying the RUA, i.e., that landowners open their property to others for recreational activities without fear of liability, the phase "for the purpose of" presents

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[5] The last antecedent rule " … provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows, unless there is some indication to the contrary." *Dessart v Burak*, 470 Mich 37, 44; 678 NW2d 615 (2004) (Weaver, J., concurring).

just such a situation. The RUA is a statute that turns upon *the reason* an individual enters the land of another, and if that reason is for outdoor recreation, then the landowner can open up the land without fear of the liability that may otherwise arise from the individual's status on the land. While the lack of payment is a critical component of the RUA, so too is the purpose of entry onto the land. Should the phase "for the purpose of" modify the phrase "valuable consideration," as suggested by the Court of Appeals, then the intent relative to the outdoor recreation becomes diminished. However, if the phase "for the purpose of" is read to modify the outdoor recreation activity, then the "valuable consideration" clause retains its significance within the statute, as does the intent of the party entering the land. Such a reading is in keeping with this Court's guidance in *Hardway* that the application of the last antecedent rule does not render any phase of the RUA meaningless, redundant or otherwise in opposition to the legislative intent relating thereto.

Turning to the specific language of the phrase, Merriam-Webster defines the term "purpose" as follows:

1. The reason why something is done or used.

2. The aim or intention of something; the feeling of being determined to do or achieve something.

3. The aim or goal of a person; what a person is trying to do, become, etc.

(See Merriam-Webster, *Purpose*, <www.merriam-webster.com/dictionary> (accessed March 2, 2020)). It defines the term "recreational" as "done for enjoyment[,]" and it defines the term 'use' as "the fact or state of being used." (See Merriam-Webster, *Recreational*, <www.merriam-webster.com/dictionary> (accessed March 2, 2020); Merriam-Webster, *Use*, <www.merriam-webster.com/dictionary> (accessed March 2, 2020)). The RUA defines recreation, with the context of the statute, to include activities such as fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling and snowmobiling. Moreover, this Court recently provided its own definition of the

term "outdoor recreational use" within the context of the RUA, wherein it explained, "[The activities at issue here] occurred outdoors and were done for refreshment or diversion, and consequently were recreational." *Otto*, 501 Mich at 1045 (citing Merriam-Webster's Collegiate Dictionary (11th ed) (defining "recreation" as, among other things, "a means of refreshment or diversion")). Through these definitions, a central theme emerges, i.e., that ***the RUA offers protection to a landowner against an injured person who entered the land with the specific intention of engaging in an active, outdoor amusement and has not paid to do so***.

With this framework in place, it becomes clear that in order for Ms. Rott's claim to be barred by RUA, she must have entered Defendant/Appellee's land for the purpose of zip lining, rather than for the purpose of attending a party, dining, and socializing with family and friends. Because evidence in the record overwhelmingly establishes that Ms. Rott was on the premises for the purpose of attending a dinner party, as testified to by Ms. Rott, Defendant/Appellee, Mr. Kukulka and Ms. Kanter, it cannot be said that she was on the land for the purpose of zip lining. (See Exh. 2, pg. 57; Exh. 3, pg. 9; Exh. 4, pg. 35). Instead, she only found herself on the zip line after she succumbed to the year-long peer-pressure campaign waged by Defendant/Appellee and his wife, Julie. (Exh. 2, pg. 45-47, 63, 64; Exh. 3; pg. 47-48, 54-55; Exh. 6, pg. 28-29). Testimony by Ms. Kanter sheds light on why Ms. Rott ultimately gave in to Defendant/Appellee's harassment: "Arthur has fights with lots of people. And yes, I'm one of them. He's a very difficult person for me to get along with. … Arthur is abusive." (See Exh. 6, pg. 17-18). Taken together, the evidence proves that Ms. Rott was on the premises, not because of the recreational activity, but despite it, and as such, her claims against Defendant/Appellee fall squarely within the purview of premises liability, rather than the RUA. Therefore, Ms. Rott now asks this Honorable Court to GRANT her application for leave to appeal to correct this clearly erroneous ruling by the Court of Appeals.

IV. ZIP LINING IS NOT WITHIN THE PURVIEW OF THE RUA, GIVEN THAT IT IS NOT WITH THE SAME 'KIND, CLASS, CHARACTER, OR NATURE' AS THE ACTIVITIES ENUMERATED WITHIN THE ACT.

In addition to the reasons laid out above, Ms. Rott submits that pursuant to the principle of *ejusdem generis*, the Court of Appeals' holding that zip lining is in the same "kind, class, character or nature" as the activities specifically shielded by the RUA was clearly erroneous. As this Court held in *Neal v Wilkes*, "the RUA does not apply to *any* outdoor recreational activity." 470 Mich. 661, 669-670; 685 NW2d 648 (2004). (Emphasis in the original). Rather, this Court explained:

> … it only applies to 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use . . . .' MCL 324.73301(1). Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.'

Id. (quoting *Huggett v Dep't of Natural Resources*, 464 Mich at 718-719). Critically, this means that "the language 'other outdoor recreational use' must be interpreted to include only those outdoor recreational uses "of the same kind, class, character, or nature," id., as 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [and] snowmobiling … .'" *Id.* (quoting MCL 324.73301(1)). In its 2018 decision in *Otto v Inn at Watervale*, this Court gave further guidance, where, as noted previously, it provided a definition of the term "outdoor recreational use," i.e., "[The activities at issue] occurred outdoors and were done for refreshment or diversion, and consequently were recreational." 501 Mich at 1045 (citing Merriam-Webster's Collegiate Dictionary (11th ed)).

An exhaustive search of the case law establishes that, prior to the instant case, the appellate judiciary has never applied the RUA within the context of zip lining, and Ms. Rott submits that this is so, because zip lining is not of the "same kind, class, character, or nature" of the activities

specifically enumerated therein. While fishing, trapping, and hunting involve interacting with wildlife native to the land, zip lining does not. And, while camping, hiking, sightseeing, motorcycling, and snowmobiling involve interacting with the land itself, zip lining does not. In fact, zip lining does not, in anyway whatsoever, involve communing or interacting with the land, and/or the wildlife and vegetation found thereupon, in its unaltered state. Rather, it can only occur when a landowner constructs an apparatus on the land for the purpose of amusement. A zip line is a thrill-seeker's adventure that can just as easily be performed inside a gymnasium as down the side of a hill, because in either scenario, the zip line results, not from the land itself, but from an apparatus constructed upon the land. The definition of a zip line provided by Michigan's Department of Labor and Regulatory Affairs ("LARA") further distinguishes a zip line from the types of activities contemplated by the RUA, where in states: "[A zip line is] an aerial adventure course element over an open span consisting of an inclined wire or fiber rope on which patron(s) are suspended from a pulley or trolley and are able to traverse with the primary force for propulsion being gravity." (See Dep't of Licensing and Regulatory Affairs, *Zip Line Guidance*, <www.michigan.gov/documents/lara/> (accessed March 2, 2020). Thus, as a mechanism created for the purpose of entertainment, a zip line is more akin to a rollercoaster or waterslide, than it is to outdoor recreation, which is derived from an interaction with the land itself.

The Legislature's understanding of a zip line can be gleaned from an examination of the recently-amended Michigan Carnival-Amusement Safety Act, codified at, MCL 408.651, *et seq*. The statute was amended in 2017 to include zip lines into its regulation of "carnival or amusement rides," which the statute defines as "a device that carries or conveys passengers along, around, or over a fixed or restricted route or course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement. …" MCL 408.652(a). Other carnival-amusement rides governed

by the statute include Ferris wheels, water slides, go-karts and roller coasters. (See Dep't of Licensing and Regulatory Affairs, (See Dep't of Licensing and Regulatory Affairs, *Keep it Safe on Carnival and Amusements*, <www.michigan.gov/documents/lara/> (accessed March 2, 2020)).The increased regulation is necessary, according to the Director of LARA's the Corporations, Securities & Commercial Licensing Bureau, because "[g]iven the increasing prevalence of zip lines throughout the country and this state, we want to ensure that they are being properly operated and maintained." (See Dep't of Licensing and Regulatory Affairs, *LARA Now Requiring Zip Line Operators to Obtain Permits*, <www.michigan.gov/documents/lara/> (accessed March 2, 2020)). Although the regulation pertains to zip lines operated on commercial premises, the inclusion of zip lines into to the Carnival-Amusement Safety Act is instructive to the instant case, because it demonstrates that the Legislature classifies a zip line as a carnival or amusement ride, rather than as outdoor recreation, as contemplated by the RUA and as this Court in *Neal*. As a result, a zip line should not be included in the activities protected by the RUA, and landowners such as Defendant/Appellee, who maintain an amateur zip line on their land, should be held to the standard of ordinary negligence, rather than of gross negligence. Ms. Rott submits that the Court of Appeals' ruling to the contrary is clearly erroneous, and it is in the public interest for this Court to both correct the error and also provide guidance on the liability issues arising from a homemade zipline. Accordingly, and for the reasons laid out fully herein regarding the law of the case doctrine and additional statutory enforcement and interpretation, Ms. Rott now asks this Honorable Court to GRANT her application for leave to appeal and allow her to bring her claims before this Court for further review.

RELIEF REQUESTED

For the foregoing reasons, the Plaintiff/Appellant, Doreen Rott, respectfully requests that this Honorable Court GRANT Plaintiff/Appellant's Application for Leave to Appeal, and allow Plaintiff/Appellee to bring her claims before this Court to correct the clearly erroneous ruling of the lower court and provide much-needed jurisprudence regarding the Recreational Land Use Act, MCL 324.73301(1) and the relationship of a zip line thereto.

Respectfully submitted,

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Date: March 2, 2020